As for the claim that the receiver and manager pay the taxed costs, I agree with the submission of his counsel that the motion should be dismissed on the ground that it would be contrary to the terms of the order made by the court on 5 March 1986 where the taxed costs were ordered to be paid by the liquidator, which order (c) reads:

> ...that the petitioner be allowed the costs of and incidental to the winding-up to be taxed by the proper officer of the court and be paid by the appointed liquidator out of the assets of the company.

The order has long been perfected and it is clear law that this court is functus officio. It is not within the powers of this court, nor even the court that gave that order, to have it amended to include that the receiver and manager must pay the taxed costs.

I find the submission of counsel for the petitioner, to the effect that an order for costs is within the court's discretion, to be not worthy of any consideration as the situation here is not the consideration the court had to take into account before it awards a party costs but it is clearly a case where a competent court had dealt with the case and had considered the matter of costs and duly made an order as to who is to pay and how it is to be settled.

The terms of the order is crystal clear. It is for the liquidator to complete his work and part of which was to pay the petitioner's costs as directed by the court. If for any reason he is unable to do so then he must seek the court's direction.

As I have said, in the face of the clear terms of the order, the petitioner's motion against the receiver and manager for the repayment of taxed costs is misconceived and no useful purpose can be served by attempting to interpret which is the section of the Companies Act which provides the answer to the situation in this matter. Any attempt in the exercise of that discretion would lead to an attempt to amend the order granted. On this ground I dismiss the motion against the receiver and manager for the reasons I have given.

As for the motion against the liquidator, it is also equally misconceived like the motion against the receiver and manager. In a similar manner an order had been granted the terms of which is plain and obvious that the appointed liquidator is to pay the taxed costs out of the assets of the company. Apart from the court being functus to vary it, the granting of an order now that the liquidator must pay costs is academic and repetitive of it. This motion is therefore dismissed with costs to the liquidator and the receiver and manager to be taxed. I order accordingly.

Motion dismissed

Solicitors: *Ong Ban Chai & Co; Abraham & Partners.*

Reported by *Seah Min Wai*

Malayan Banking Bhd v Pendaftar Hakmilik, Negeri Pahang & Anor

HIGH COURT (KUANTAN) — ORIGINATING MOTION NO 25-15-89
LAMIN J
25 SEPTEMBER 1990

Civil Procedure — Caveat — Application to remove by originating summons — Whether correct mode — Whether applicant appropriate party to bring action — National Land Code 1965, ss 321 & 418

The applicant in this case applied for an order by way of an originating motion that the registrar 'be directed to remove the Registrar's Caveat No 601/88 Jilid 26 Folio 54 registered on that piece of land held under HS(M) 13362 PT No 947/34, mukim Kuala Kuantan'. The applicant was the registered chargee of the said land which was charged to secure a loan of $77,000 from the applicant in favour of the chargor. As the chargor had been in default of the loan, he therefore approached the applicant with the view of disposing of the charged property to a third party by way of a private sale in order to satisfy the debt. However this arrangement could not be finalized as a search at the Land Office Kuantan revealed that a registrar's caveat had been registered against the charged land on the ground that the chargor had not paid her income tax.

Held, dismissing the application:

(1) The present application should have been before the court by way of an appeal under s 418 of the National Land Code 1965. The wording of the said section is clear and unambiguous in that the legislature has laid down one and only one mode of procedure by which an aggrieved party may obtain redress before the High Court.

(2) As the present case relates to a registrar's caveat and under the Code it is the registrar who has to decide whether to register a caveat in any particular case as it 'appears to him to be necessary or desirable' for any of the purposes as stipulated under s 320(1) of the Code, if any party is aggrieved by the registrar's decision then it must be his decision that has to be examined or questioned.

(3) As the purpose of the present application is to have the registrar's caveat cancelled then it is the proprietor of the land (and in this case it must be the chargor) who must first apply to the registrar to have the registrar's caveat cancelled as required under sub-s (3)(b) of s 321. If the registrar refuses to cancel it, then the proprietor of the land being the aggrieved party (and not the chargee who is the applicant in this case) may take the matter up on appeal to the High Court.

(4) In the present case, there is no evidence that the proprietor of the land has applied to the registrar for the cancellation of the caveat and there is no evidence of the decision of the registrar's refusing to cancel it as to constitute a ground for an appeal by the owner of the land under s 418 of the Code.

[Bahasa Malaysia summary

Pemohon di dalam kes ini memohon melalui usul pemula supaya pendaftar 'diarahkan supaya mengenepikan kaveat Pendaftar No 601/88 Jilid 26 Folio 54 yang didaftarkan atas tanah yang dipegang dibawah HS(M) 13362 pt No 947/34, mukim Kuala Kuantan'. Pemohon adalah pemegang caj berdaftar tanah itu yang telah dicaj untuk menjamin pinjamin sebanyak $77,000 daripada pemohon kepada penggadai. Oleh kerana penggadai telah gagal membayar balik pinjaman itu,

beliau pun berunding dengan pemohon dengan tujuan hendak menjual tanah yang dicaj itu kepada pihak ketiga secara jualan persendirian untuk menjelaskan hutang itu. Walau bagaimanapun, rancangan ini tidak dapat di jayakan kerana semakan di Pejabat Tanah Kuantan telah menunjukkan bahawa satu kaveat pendaftar telah didaftar terhadap tanah yang dicaj itu atas alasan yang penggadai telah gagal membayar cukai pendapatannya.

Diputuskan, menolak permohonan itu:

(1) Permohonan ini seharusnya dibawa ke hadapan mahkamah melalui rayuan di bawah s 418 Kanun Tanah Negara 1965. Perkataan dalam seksyen itu adalah jelas dan tidak kabur bahawa dewan perundangan telah menentukan satu dan hanya satu aturan prosedur untuk sesuata pihak yang tidak berpuas hati mendapat bantuan di hadapan Mahkamah Tinggi.

(2) Oleh kerana kes ini adalah berkenaan dengan kaveat pendaftar dan di bawah Kanun itu pendaftar ialah orang yang harus membuat keputusan samada hendak mendaftar kaveat dalam sesuatu kes itu sebagaimana 'appear to him to be necessary or desirable' untuk mana-mana tujuan yang dijelaskan dalam s 320(1) Kanun itu, jika sesuata pihak itu tidak berpuas hati dengan keputusan pendaftar, maka keputusannyalah yang mesti dikaji atau disoal.

(3) Oleh kerana tujuan permohonan ini ialah untuk membatalkan kaveat pendaftar, maka pemilik tanah itu (dan dalam kes ini mestilah penggadai) mestilah terlebih dahulu memohon kepada pendaftar untuk membatalkan kaveat pendaftar itu seperti yang dikehendaki oleh seksyen kecil (3)(b) s 321. Jika pendaftar enggan membatalkannya, maka pemilik tanah itu sebagai pihak yang tidak berpuas hati (dan bukan pemegang caj yang menjadi pemohon dalam kes ini) boleh membawa perkara itu secara rayuan ke Mahkamah Tinggi.

(4) Dalam kes itu, tidak ada keterangan bahawa pemilik tanah telah memohon kepada pendaftar untuk membatalkan kaveat itu dan tidak adah keterangan tentang keengganan pendaftar membatalkan kaveat untuk mendirikan alasan bagi membolehkan pemilik tanah itu merayu di bawah s 418 Kanun itu.]

[*Editorial Note*: The applicant has appealed to the Supreme Court vide Civil Appeal No 01-41-90.]

Cases referred to

1 *Land Executive Committee of Federal Territory* v *Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234 (folld)

Legislation referred to

National Land Code 1965 ss 321, 418

Mohamad Ariff bin Md Yusof for the applicant.

Othman bin Abdullah (State Legal Adviser) for the first respondent.

Mohamed Bazain bin Idris (Senior Federal Counsel) for the second respondent.

Cur Adv Vult

Lamin J: The applicant in this case applied for an order by way of an originating motion that the registrar 'be directed to remove the Registrar's Caveat No 601/88 Jilid 26 Folio 54 registered on that piece of land held under HS(M) 13362 PT No 947/34, Mukim Kuala Kuantan' (encl 1). In the supporting affidavit (encl 2), it was deposed that the applicant was the registered chargee of the said land which was charged to secure a loan of $77,000 from the applicant in favour of the chargor. As the chargor had been in default of the loan, he therefore 'on or about January 1989' approached the applicant with the view of disposing of the charged property to a third party by way of a private sale in order to satisfy the debt. However this arrangement could not be finalized as a search at the Land Office Kuantan revealed that a registrar's caveat had been registered against the charged land on the ground that the chargor had not paid her income tax. The solicitors for the applicant then wrote to the Jabatan Hasil Dalam Negeri Kuantan requesting for the removal of the registrar's caveat. The Jabatan Hasil Dalam Negeri Kuantan refused to entertain the request. However it was prepared to reconsider it if the applicant could provide a proposal in settlement of the taxes amounting to $71,520.74 owing by the chargor. The applicant maintained, inter alia, that the entry of the registrar's caveat and the refusal to cancel it were improper in law.

I dismissed the application with costs on 23 April 1990 on the following grounds. In my view this application should have been before this court by way of an appeal under s 418 of the National Land Code 1965. The wording of the said section is clear and unambiguous in that the legislature has laid down one and only one mode of procedure by which an aggrieved party may obtain redress before the High Court. Subsection (1) of s 418 states that:

> (1) Any person or body aggrieved by *any decision under this Act* of the State Director, the Registrar or any Land Administrator *may*, at any time within the period of three months beginning with the date on which it was communicated to him, *appeal* therefrom to the High Court. (Emphasis provided.)

The phrase 'aggrieved by any decision under this Act of ... *may* ... appeal' must necessarily mean that for any person who is not happy with the decision of any of the three officials, namely, the state director, the registrar or any land administrator on *any matter* under the Code his only recourse for redress is by way of appeal to the High Court and that he has only *three months* 'beginning with the date on which it (the decision) was communicated to him within which to file his appeal.' Raja Azlan Shah Acting LP, as he then was, when delivering the judgment of the Federal Court in the case of *Land Executive Committee of Federal Territory* v *Syarikat Harper Gilfillan Bhd*[1] at p 237 said:

> If the relevant authority commits an error in the interpretation of the section then an aggrieved party has a right of appeal to the High Court under s 418 of this Code. Parliament has on the good ground of public policy found that that is a just and necessary right. But in this same section Parliament has also enacted a special procedure of enforcing that right ...

> Reading s 418 of the Code, we are satisfied that the latter is the correct interpretation. Having regard to the special provision for limiting the time within which to enforce the right, the indications are that Parliament has by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it. The time-limit is the foundation of the right given in the section. It is in the highest degree improbable that the period of three months as a limitation would have been inserted if the indefinite period were intended to be given. The period of three months is obviously for the purpose of preventing stale claims. If the contrary is sustainable, then the respondents are allowed to seek to enforce their statutory right by a method other than that prescribed by the Code creating it.

As the present case relates to a registrar's caveat and that under the Code it is the registrar who has to decide whether to register a caveat in any particular case as it 'appears to him to be necessary or desirable' for any of the purposes as stipulated under s 320(1) of the Code, and if any party is aggrieved by the registrar's decision then it must be his decision that has to be examined or questioned. If this decision to enter a registrar's caveat is not questioned then the caveat continues in force until it is cancelled by him. Subsection (3) of s 321 of the Code provides that a registrar's caveat continues in force until it is cancelled by him either:

(a) of his own motion; or
(b) on an application in that behalf by the proprietor of the land affected; or
(c) pursuant to any order of the Court made on an appeal under section 418 against his decision to enter the caveat, or his refusal of any application for its cancellation under paragraph (b).

As the purpose of the present application is to have the registrar's caveat cancelled then it is the proprietor of the land (and in our case it must be the chargor) who must first apply to the registrar to have the registrar's caveat cancelled as required under sub-s (3)(b) of s 321. If the registrar refuses to cancel it then the proprietor of the land being the aggrieved party (and not the chargee who is the applicant in our case) may take the matter up on appeal to the High Court. In the event of the appeal being allowed in the terms that the High Court will make the order directing the registrar to cancel the caveat only then will the registrar be moved to effect the cancellation (s 321(3)(c)). In the present case, first, there is no evidence that the proprietor of the land has applied to the registrar for the cancellation of the caveat and secondly, there is no evidence of the decision of the registrar's refusing to cancel it as to constitute a ground for an appeal by the owner of the land under s 418 of the Code. It is not the decision of the Department of Inland Revenue that must be challenged for refusing to entertain the request to cancel the caveat. Its decision may only serve as a ground for the registrar's refusal to cancel it. Of course there has been no appeal and in the circumstances I therefore dismissed the application for failure to comply with the expressed provisions of the Code and that the applicant is not the proper party to come to this court for redress in regard to the matter before me.

Finally, I wish to mention in passing one minor point which relates to the application of s 418(1) and it pertains to the period during which an appeal may be lodged. In the light of the above, this question is of little or of no consequence at all. However if I may observe that the Department of Inland Revenue made a request for an entry of a registrar's caveat on the said land on 1 September 1988 (encl 5A para 6). The caveat was registered on the same day (encl 7A para 3). About the month of January 1989, the chargor approached the applicant with a view to disposing of the charged property to a third person by way of a private sale but it could not be done as a search in the Kuantan Land Office revealed that there was already a registrar's caveat registered. We are not told when the search was made and I am sure this information is available. Anyway it is not before us for reasons best known to the applicant. However, if the chargor, being the aggrieved party, wishes to appeal against the decision of the registrar to enter the caveat, I think it is only reasonable for the period of three months to be calculated from January 1989. If the present application were to be treated as an appeal under s 418 of the Code and the date of filing being 27 October 1989, then the aggrieved party was clearly out of time.

The other issues such as priority of interest, whether the registrar's caveat was properly entered in law and whether the Department of Inland Revenue could have caveatable interest so as to permit the entry of the registrar's caveat under the Code are of no relevance for consideration here.

Application dismissed.

Solicitors: *Cheang & Ariff.*

Reported by *Kevin Mathews*